Pace Environmental Law Review

Volume 14
Issue 2 *Summer 1997*

Article 15

June 1997

Brief for Plaintiff-Appelle While-U-Wait Photo Service: Ninth Annual Pace National Environmental Moot Court Competition

University of Texas School of Law

Civ. No. 96-214

IN THE
UNITED STATES COURT OF APPEALS FOR THE
TWELFTH CIRCUIT

While-U-Wait Photo Service (WUWPS)
Plaintiff-Appellee
v.
Greater Uniontown Vocational School (GUVS)
Defendant-Appellant
State of New Union Health Services Agency (SNUHSA)
Plaintiff-Appellee
v.
Greater Uniontown Vocational School (GUVS)
and
While-U-Wait Photo Service (WUWPS)
Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW UNION

BRIEF FOR PLAINTIFF-APPELLEE WHILE-U-WAIT PHOTO SERVICE*

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Counsel for WUWPS

QUESTIONS PRESENTED

I. Did the district court properly follow the weight of authority in applying the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) retroactively and in holding that the ten years of chemical dumping by the Greater Uniontown Vocational School (GUVS) falls within Congress's Commerce Clause jurisdiction?

II. Did the district court properly interpret CERCLA's liability provisions when it allowed While-U-Wait Photo Service (WUWPS) to seek recovery from GUVS for the costs of cleaning the site that GUVS polluted, but held WUWPS liable for the costs of a medical monitoring regime independently administered by the State of New Union Health Services Agency (SNUHSA)?

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To the Honorable United States Court of Appeals for the Twelfth Circuit:

Plaintiff-appellee, While-U-Wait Photo Service (WUWPS), respectfully submits this brief in support of its request that this Court reverse in part the decision of the United States District Court for the District of New Union and render judgment for WUWPS on both claims heard by that court. Specifically, WUWPS requests that this Court reverse the decision allowing the State of New Union Health

Services Agency (SNUHSA) to recover medical monitoring costs from WUWPS and GUVS while affirming the remainder of the district court's decision.

OPINION BELOW

In a decision entered April 23, 1996, the United States District Court for the District of New Union held that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) applies to the photochemical waste dumping at 123 Laurel Street, Uniontown, because the dumping affected interstate commerce sufficiently to invoke federal Commerce Clause jurisdiction and because CERCLA may be applied retroactively. (R. at 8). The court also held that While-U-Wait Photo Services (WUWPS) could seek recovery from the Greater Uniontown Vocational School (GUVS) for site cleanup costs under either CERCLA 107 or CERCLA 113. (R. at 9). Finally, the court held that CERCLA 107 allows the State of New Union Health Services Agency (SNUHSA) to seek compensation from GUVS and WUWPS for the medical monitoring program it set up for parties exposed to the Laurel Street waste release. (R. at 9).

CONSTITUTIONAL PROVISION

Article I, section 8, clause 3 of the United States Constitution provides in pertinent part that "Congress shall have the Power [t]o regulate Commerce . . . among the several States."

STATUTORY PROVISIONS

The following statutory provisions are relevant and are treated at length within the text of the brief: CERCLA 101(23), 101(24), 104(i), 107, and 113. The pertinent text is set forth in full in an appendix attached hereto.

STATEMENT OF THE CASE

Statement of Facts

The relevant facts are simple and undisputed:

Elizabeth Andrews, the sole owner and operator of While-U-Wait Photo Service (WUWPS) in Uniontown, New Union, has never failed to take photo-processing chemicals from her business to the New Union State Environmental Protection Agency's "hazardous-waste collection days." (R. at 5,6). Working through WUWPS, she fronted the cost of cleanup when she discovered that groundwater contamination at 123 Laurel Street was causing her neighbors discomfort. (R. at 6). Now, representatives for the Greater Uniontown Vocational School (GUVS) believe that WUWPS should absorb the expenses for the cleanup even though the contamination was largely the result of GUVS's own dumping when it previously owned the property from 1963 to 1973. (R. at 4,5).

Although GUVS is a creation of the New Union Legislature, it is now an independent entity from the state government. The Legislature incorporated GUVS by statute in 1963, and allocated $1 million for start-up costs. (R. at 3,4). Since then, GUVS has never again sought funding from the Legislature. (R. at 4). In fact, GUVS has received at least $3 million from the private sector. (R. at 5). Although the Legislature appointed GUVS's initial board of directors, GUVS thereafter has had complete control over appointments, subject only to the normal parameters applicable to any nonprofit business. (R. at 4). A 1964 opinion of the New Union attorney general concluded that "GUVS is not an instrumentality of the New Union state government." (R. at 4).

GUVS operated at the 123 Laurel Street location until 1973, during which time it dumped photographic-solution refuse into a small ditch in the backyard. (R. at 4, 5). The raw materials used to produce the chemicals and to manufacture the equipment used in the GUVS's photography program came from a nationwide market. (R. at 5).

On April 27, 1973, GUVS sold its real property at 123 Laurel Street and all its photographic equipment to Start-Up Photography Studios (SUPS). (R. at 5). SUPS operated at the site until April 23, 1979, continuing the dumping practices first adopted by GUVS. (R. at 5).

On September 30, 1980, WUWPS bought the 123 Laurel Street property from the bankrupt SUPS. (R. at 5). WUWPS operates as a photo-processing business at the location and draws all of its customers from Union County. (R. at 5).

Nothing in the sales contracts and deeds transferring the 123 Laurel Street property from GUVS to SUPS, and later to WUWPS, says anything about hazardous-waste liability, but Ms. Andrews knew about GUVS's and SUPS's disposal practices. (R. at 6).

In 1993, the Marina family, who occupy the house next door, began to complain of a "camera-type" odor coming from their water well. (R. at 6). Acting promptly on its own accord, WUWPS paid $300 to have the Marinas' water tested. (R. at 6). The tests revealed elevated levels of photo-processing chemicals in the water, and an engineering firm's report determined that the ditch in the backyard of 123 Laurel Street was the source of the chemicals. (R. at 6).

WUWPS again footed the bill in 1994, paying the engineering firm $30,000 to investigate and remove contaminated soil. (R. at 6). Because of these actions, there is no longer a threat to human health or the environment from contaminated soil or water. (R. at 6). The parties stipulate that the water testing and the work of the engineering firm were conducted consistent with the National Contingency Plan. (R. at 6).

Having little money and no health insurance, the Marinas requested that the State of New Union Health Services Agency (SNUHSA), New Union's public health department, examine each member of the family. (R. at 6, 7). In September of 1994, SNUHSA began a medical monitoring program for the Marinas, examining each of the five minor children and two adults every calendar quarter. (R. at 7). The cost of continuing testing for adverse effects from the exposure is $250 per person per quarter. (R. at 7). Although SNUHSA has found no adverse effects, it expects to continue the testing through December 2000. (R. at 7). The parties stipulate that SNUHSA's actions are not inconsistent with the National Contingency Plan. (R. at 7).

Procedural History

WUWPS sued GUVS under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), seeking reimbursement for the costs of water testing, site investigation and soil removal under CERCLA 107(a)(4)(B). (R. at 7). At the same time, SNUHSA sued GUVS and WUWPS for medical monitoring costs under CERCLA 107(a)(4)(A). (R. at 7). These actions have been consolidated. (R. at 7).

On cross-motions for summary judgment, the United States District Court for the District of New Union ruled that CERCLA applies to this case, that WUWPS may proceed against GUVS under CERCLA 107 and that medical monitoring costs are recoverable by SNUHSA from both GUVS and WUWPS. (R. at 9).

WUWPS appeals the lower court's decision to allow SNUHSA to recover medical monitoring costs from WUWPS. (R. at 1). GUVS appeals on both the medical monitoring issue and the lower court's decision to apply CERCLA to the case at hand. (R. at 1).

Standard of Review

Review of a district court's grant of summary judgment is de novo. *Abuan v. General Electric Co.*, 3 F.3d 329, 331 (9th Cir. 1993). It is the trial judge's function "to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1985). The circuit court reviews facts in the light most favorable to the nonmoving party to find support for the lower court's factual determinations. *Redland Soccer Club, Inc. v. Dep't of the U.S. Army*, 55 F.3d 827, 844 (3d Cir. 1995). The circuit court also looks to see "whether the district court correctly applied the relevant substantive law." *FDIC v. O'Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992).

SUMMARY OF THE ARGUMENT

WUWPS urges this court to affirm the findings of the court below with the exception of the ruling pertaining to liability for medical monitoring costs.

First, the district court properly found that Congress intended for CERCLA to reach back and redress environmental wrongs by imposing liability on the parties responsible for the presence of hazardous waste. The district court also properly ruled that the disposal of hazardous waste at any level is an activity that substantially affects interstate commerce and that CERCLA as applied to the contamination of 123 Laurel Street is an appropriate exercise of congressional Commerce Clause authority. By arguing to the contrary, GUVS opposes every court that addresses these issues, save one, and contradicts the plain language and legislative history of CERCLA.

Second, the court below correctly ruled that WUWPS is entitled to bring an action to recover the cost of remediating the Laurel Street property under either section 107 or 113 of CERCLA. The plain language of 107 provides that GUVS, as a potentially responsible party, is liable for response costs incurred by *any* other person. There is no qualifying language that would render this provision inapplicable to the case at hand.

However, the district court erred in finding that WUWPS is liable to SNUHSA for medical monitoring costs. The medical monitoring regime that SNUHSA has recommended for the Marina family lies within the realm of personal injury treatment and prevention. Congress specifically left out recovery provisions for personal injury when it passed CERCLA, and interpreting the statute otherwise would cause confusion of state and federal toxic waste laws. Even if the medical monitoring costs fell within CERCLA's realm, however, SNUHSA still would not be able to recover for the monitoring because CERCLA sets up an elaborate system of medical testing that excludes medical monitoring from its recovery provisions. For these reasons, WUWPS urges this Court to overrule the district court and allow medical moni-

toring costs to remain the province of the state health services agency.

ARGUMENT

I. THE DISTRICT COURT PROPERLY RULED THAT RETROACTIVE APPLICATION OF CERCLA TO THE DUMPING OF HAZARDOUS SUBSTANCES AT THE LAUREL STREET SITE IS VALID UNDER THE COMMERCE CLAUSE AND THAT GUVS IS LEGALLY LIABLE FOR THE COSTS OF REMEDIATING THE SITE IT POLLUTED.

GUVS has conceded that it is a potentially responsible party (PRP) under the CERCLA test for liability. 42 U.S.C. § 107(a) (1995). The only way for GUVS to escape responsibility for remediating the property it contaminated is for it to assert that the entire CERCLA statute was not meant to encompass its actions and that CERCLA, as applied to this case, is not a valid exercise of Congress's Commerce Clause authority. To this end, GUVS not only contradicts the clearly expressed intent of Congress, but relies upon a widely questioned decision as its only authority for these arguments.

A. Retroactivity is the key to CERCLA's effectiveness and was clearly Congress' intent, as revealed by the language and legislative history of the statute as well as subsequent congressional reauthorization and case law.

(i) The express language of CERCLA supports the finding of the lower court that Congress intended to impose retroactive liability.

CERCLA is couched in the past tense. The very title of the statute indicates that Congress contemplated an act that would authorize a cause of action for costs incurred in response to environmental hazards. Presumably, Congress did not intend for CERCLA to apply only to sites that were contaminated after the enactment of such legislation. It is important, when determining the reach of the statute, to

remember the context in which it was adopted. CERCLA was passed in direct response to notorious environmental disasters of the 1970s involving inactive and abandoned sites, such as Love Canal in upstate New York. S. Rep. No. 848, 96th Cong., 2d Sess., 8-10 (1980), *reprinted in Superfund: A Legislative History*, (Envt'l L. Inst.) (1982) at Vol. 1, 315-17. As a matter of common sense, the only way an inactive or abandoned site is going to be remediated is if a statute covers releases that PRPs allowed to occur before enactment.

GUVS relies upon *United States v. Olin*, 927 F. Supp. 1502 (S.D. Ala. 1996), *appeal docketed*, No. 96-6645 (11th Cir. July 10, 1996), in asserting that CERCLA was not meant to apply retroactively. *Olin* in turn relies upon the U.S. Supreme Court's decision in *Landgraf v. USI Film Prods.*, 114 S.Ct. 1483 (1994), for the assertion that Congress has not demonstrated a clear retroactive intent in the express or non-express statutory language of CERCLA. *Olin*, 927 F. Supp. at 1512. In fact, CERCLA 107(a) expressly imposes liability on "any person who *at the time* of disposal of any hazardous substances owned or operated any facility. . . ." 42 U.S.C. § 9607(a)(2) (1995)(emphasis added). The phrase "at the time of disposal" is unambiguous and unlimited in temporal scope. *See United States v. NEPACCO*, 810 F.2d 726, 732 (8th Cir. 1986).

(ii) CERCLA's legislative history also supports the lower court's finding that Congress intended to impose retroactive liability.

Once again, the context in which the statute was adopted is important. Congress' plain intent in passing CERCLA was to impose liability on *all* responsible parties, including those whose involvement occurred prior to CERCLA's enactment. To that end, liability under CERCLA has historically been considered strict, joint and several, and retroactive. Administration of the Federal Superfund Program, 103d Cong., 1st Sess., Report of the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation 3 (1993). As both the EPA and Congress have stated, one of the goals of CERCLA is to ensure that the polluter pays. S.

Rep. No. 848, 96th Cong., 2d Sess. 2, 13 (1980). *See also Twenty New Reforms Cap 2-Year Effort to Reform Superfund, EPA Administrator Calls for Legislative Changes*, (U.S. Environmental Protection Agency news release), 1995 WL 578216 (Oct. 2, 1995). Under the facts of this case, GUVS is certainly a liable polluter.

Before enacting CERCLA, the House Committee on Interstate and Foreign Commerce commented upon the Resource Conservation and Recovery Act (RCRA), the only federal statute addressing toxic waste pollution enacted at the time, expressing concern about the effect of discarded hazardous wastes on the population and the environment. H.R. Rep. No.1491, 94th Cong., 2d Sess., 3-4 (1976).

Four years later, Congress enacted CERCLA in order to address the problem of abandoned and inactive waste sites that the forward-looking provisions of RCRA did not reach. What legislative history exists concerning the intended purpose of CERCLA uniformly indicates that Congress clearly intended to provide a solution to longstanding systemic and widespread practices of hazardous waste dumping.

Moreover, in the House debate over CERCLA's Superfund and liability provisions, Representative Jeffords noted that rather than relying on the Fund alone to finance remediation, the final bill "would establish liability rules to govern payment into the fund by those persons responsible for *causing* the release of hazardous waste, replenishing the fund for *future cleanup* and resource compensation payments to governments. 126 Cong. Rec. 31,978 (1980). In the Senate, Senator Dole advocated the elimination of Fund authority to borrow from the Treasury because the final compromise "ought to provide a self-financing mechanism for hazardous waste cleanup." 126 Cong. Rec. 30,950 (1980).

Congress clearly intended to impose liability for response costs upon parties whose pre-enactment conduct caused environmental harm. The District Court of New Union correctly recognized that the remedial nature of CERCLA confers upon WUWPS an opportunity to recover from the polluting parties.

(iii) The lower court's finding of congressional intent to impose retroactive liability also is supported by CERCLA reauthorization in light of the courts' consistent findings for retroactive effect.

If Congress did not intend to establish retroactive liability under CERCLA, it has had 16 years to amend the legislation and rectify the situation. There is no shortage of evidence that the courts interpret CERCLA as retroactive; indeed, the leading CERCLA cases apply the traditional presumption against retroactive application of statutes revisited in *Landgraf* and find for CERCLA retroactivity on the basis that congressional intent in favor of such a result is manifestly clear. *See NEPACCO*, 810 F.2d at 732; *United States v. Shell Oil Co.*, 605 F.Supp. 1064, 1069 (D. Colo. 1985); *Ohio v. Georgeoff*, 562 F. Supp.1300, 1308-09 (N.D. Ohio 1983). Unless and until Congress addresses the issue of CERCLA's retroactivity, there is no justifiable reason for overturning a proposition that hundreds of PRPs have relied upon in settling their CERCLA suits with other parties and the EPA.

While it is true that CERCLA liability has been criticized by PRPs and other interested parties as harsh and broad, such concerns are best addressed by Congress, and not by the judicial body. Indeed, retroactive liability under CERCLA has been hotly contested in recent congressional sessions. The fact that Senator Oxley's proposed reform bill, H.R. 2500, contains a repeal of retroactive liability suggests that Congress believes the current liability scheme to be retroactive. H.R. 2500, 104th Cong., 1st Sess. (1995).

(iv) Courts have declined to follow *Olin*'s rejection of CERCLA retroactivity in subsequent decisions.

Despite the evidence to the contrary, the United States District Court for the Southern District of Alabama recently held that CERCLA does not apply to waste release sites retroactively. *Olin*, 927 F. Supp. 1502. This decision not only flies in the face of congressional intent but also stands alone in the midst of a plethora of cases deciding otherwise. *Olin* is

the sole authority GUVS can cite for its argument that it is not liable for the costs of removing soil which it contaminated.

In *Davon, Inc. v. Shalala*, 75 F.3d 1114, 1122 (7th Cir. 1996), the Seventh Circuit found that a retroactive financing provision of the Coal Act of 1992 was not violative of the Due Process Clause, nor was it an unconstitutional taking. In rejecting the plaintiffs' argument that retroactive legislation requires a higher level of scrutiny, the Court stated that "Supreme Court precedent could not be more contrary to [plaintiffs'] position." *Id.* at 1122. Like the Coal Act at issue in *Davon*, CERCLA is "a classic example of an economic regulation — a legislative effort to structure and accommodate 'the burdens and benefits of economic life.'" *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 83 (1978)(quoting *Useryv. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)). The test of due process required in assessing economically retroactive legislation is that Congress "must have an independent rational basis for making a law retroactive." *Davon*, 75 F.3d at 1123. The Seventh Circuit not only was aware of the *Landgraf* decision when it issued the *Davon* opinion, it even cited to the opinion. *Id.* at 1122. Yet, the Seventh Circuit saw no conflict between *Landgraf* and CERCLA, noting in rejecting "degree of retroactivity" as a factor in a due process inquiry that "[s]uch a proposition would ignore precedent upholding the unlimited retroactive reach of . . . CERCLA." *Id.* at 1126. In the case at hand, the independent rational basis for making CERCLA retroactive not only is met, but also is indispensable to the meaning of the statute itself. In order to remediate abandoned sites, Congress intended for CERCLA to provide a mechanism allowing the imposition of liability for cleanup on parties responsible for the presence of the hazardous chemicals, regardless of past or present ownership.

The Third Circuit rejected *Olin* and upheld the retroactive effect of CERCLA in *United States v. Alcan Corp.*, Civ. No. 95-7570 (3d Cir. Aug. 22, 1996). Likewise, in *Gould, Inc. v. A&M Battery & Tire Serv.*, 933 F. Supp. 431, 437 (M.D. Pa. 1996), a Pennsylvania district court noted that *Olin* was "the

only Court to date to hold that CERCLA does not apply retroactively." That court held that "[a]ccordingly, we are unpersuaded by a single Alabama District Court case which is surrounded by a myriad of opinions that apply CERCLA retroactively, either directly or implicitly. Thus, we will reject Defendants' arguments on retroactivity grounds." *Id. See also Nevada v. U.S.*, No. CV-S-94-393-DWH (LRL) (D. Nev. 1996); *Cooper Indus., Inc. v. Agway, Inc.*, No. 92-CV-0748 (N.D.N.Y. 1996).

Furthermore, it should be noted that *Olin* is not a done deal — an appeal is pending that could very well turn over that source of authority for GUVS.

B. Application of CERCLA to the Laurel Street release is a valid exercise of Congress' Commerce Clause power because GUVS' and SUPS' disposal activities substantially affected interstate commerce.

It is difficult to comprehend how disposal of a commercial by-product could not be economic activity. It is also difficult to understand how one could rationally say that hazardous waste disposal does not have a substantial effect on interstate commerce. But such is GUVS's position.

GUVS's argument fails to overcome the *Lopez* test for federal Commerce Clause jurisdiction. *See United States v. Lopez*, 115 S.Ct. 1624 (1995). Chemical dumping actually satisfies the two prongs of the *Lopez* test, invoking federal Commerce Clause jurisdiction. *Id.*

GUVS's reliance on the aforementioned decision in *Olin* and the Supreme Court's decision in *Seminole Tribe of Florida v. Florida*,116 S.Ct. 1114 (1996), is also erroneous. The *Olin* court tried to defer to *Lopez* but mischaracterized the *Lopez* test. *See Olin*, 927 F. Supp. 1502. For this reason as well as for those already enumerated, *Olin* has been widely criticized. *Seminole* addresses the issue of whether or not Congress may waive a state's right to immunity from suit by its citizens. *See Seminole*, 116 S.Ct. 1114. That issue has nothing to do with the case at hand.

(i) Application of CERCLA to the Laurel Street circumstances meets the *Lopez* test for federal Commerce Clause jurisdiction.

Chief Justice Rehnquist based his majority opinion in *Lopez* on two major issues: 1) Federal statutes must deal with activities that have a substantial effect on interstate commerce rather than merely regulating economic activity, and 2) They may not attempt to regulate an area of traditional state authority. *Lopez*, 115 S.Ct. 1624. In this case, GUVS can claim neither factor. The release of hazardous substances at Laurel Street is an economic activity that substantially affects interstate commerce, and it falls under environmental law, which is traditionally a federal body of law. Application of CERCLA to the Laurel Street cleanup is fully within Congress' Commerce Clause power.

GUVS's dumping of photographic chemicals causes a substantial impact on interstate commerce. Although New Union Industrial Supply Corp. formulated the chemicals used in the photography program and manufactured the equipment used in the program, the corporation purchased the materials for the chemicals and the equipment from vendors nationwide. The fundamental components of the chemicals dumped by GUVS undeniably crossed state lines, thus implicating interstate commerce.

GUVS might argue that in *Lopez* the guns regulated by § 922(q) of the Gun-Free School Zones Act of 1990 also crossed state lines before their ultimate sale. *Id.* at 1626. Therefore, the fact that the components of the photographic chemicals and equipment crossed state lines during manufacture is meaningless. However, the Supreme Court's decision in *Lopez* was that the act went beyond Congress' Commerce Clause jurisdiction: The target of the act was not the commercial result of the interstate shipments, the sale of guns; the target was the social end-product — violence against schoolchildren. *See id.* By contrast, the activity sought to be regulated by CERCLA in this case is commercial waste, not the waste of human lives.

In *Lopez*, the Supreme Court found that the Gun-Free School Zones Act did not regulate economic activity, but rather it cut down on criminal behavior. *See id.* Clearly, such is not the case with CERCLA. GUVS ran a business providing education to New Union citizens. Part of that business involved the use and disposal of photographic chemicals formulated from out-of-state components. "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Id.* at 1630. The results of interstate transportation and subsequent disposal of photographic chemicals fall within the regulatory power of Congress under the Commerce Clause.

Even if GUVS' own dumping had only a de minimis effect on interstate commerce, dumping is an economic activity that substantially affects interstate commerce in the aggregate. In *Wickard v. Fillburn*, 317 U.S. 111, 127-128 (1942), the Supreme Court held that although one economic actor's activity may be too trivial to substantially affect interstate commerce, that activity may still be regulated by Congress if the aggregate of such activity by other similarly situated economic actors does substantially affect interstate commerce.

If businesses across the nation were free from federal regulation of chemical dumping, the nation's groundwater supply would be seriously jeopardized. As evidenced by GUVS's and SUPS's behavior before the passage of CERCLA, businesses are unlikely to take measures essential to the protection of our water supply without prodding by federal regulation. In many ways that arguably are too obvious to enumerate, interstate commerce depends on a safe water supply. Safe water helps to ensure the health of workers. Clean water helps ensure that industrial processes function properly. Pollution regulations in general protect the environment in which we live and the commercial centers from which we produce.

One farmer's wheat consumption is said to substantially affect interstate commerce in periods of price controls because the same activity by the aggregate of all farmers similarly situated certainly has an impact on interstate commerce. *Id.* at 127. One polluter's chemical dumping like-

wise substantially affects interstate commerce because the same behavior by the aggregate of all polluters similarly situated would have tremendous effects. As Congress may regulate the lone farmer, so may Congress regulate the lone polluter.

The Supreme Court further expounded upon the aggregation principle in *Hodel v. Indiana*, 452 U.S. 314 (1981). In *Hodel*, the Court said that a complex regulatory program can survive a Commerce Clause challenge without a showing that every facet is related to a valid congressional goal. *Id.* at 329 n. 17. As already established, regulation of the dumping by GUVS is a valid congressional goal, but *Hodel* allows that even if the goal were not valid, CERCLA, as a regulatory program, is a constitutional exercise by Congress of its Commerce Clause authority.

As stated previously, Congress intended to remedy the ravages of largely unregulated hazardous waste management resulting from commercial activity nationwide. Numerous courts have held that under such a rationale, CERCLA is a legitimate exercise by Congress of its Commerce Clause jurisdiction. *See Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692, 707-708 (D. Kan. 1991)(noting the abundance of congressional findings concerning the pervasive effects of hazardous-waste releases into the environment); *Missouri v. Indep. Petrochem. Corp.*, 13 Chem. Waste Lit. Rep. 463 (E.D. Mo. 1986).

In addition, the court should keep in mind that federal regulations enacted under the Commerce Clause are subject to rational-basis review. *Hodel*, 452 U.S. at 329 (1981). Therefore, a court must give substantial deference to Congress's determination that a regulation falls within its Commerce Clause power. In light of the substantial rational basis for CERCLA, the Twelfth Circuit should uphold CERCLA as a legitimate regulatory scheme and application of CERCLA to GUVS as an aspect of that scheme.

Chief Justice Rehnquist's second test factor focused on the intrusion into an area traditionally regulated by the states. *Lopez*, 115 S.Ct. at 1630-1631. In *Lopez*, that area

was criminal law, but unlike criminal law, environmental law is not clearly an area of traditional state regulation.

Although there were few federal pollution statutes before 1970, there also were not many state pollution statutes. John P. Dwyer, *The Commerce Clause and the Limits of Congressional Authority to Regulate the Environment*, 25 Envtl. L. Rep. (Envtl. L. Inst.) 10408 (1995). After 1970, though, federal regulation of the environment proliferated. "As a practical matter, it is too late in 1995 to claim that federal environmental legislation . . . improperly intrudes on state authority. . . . Federal environmental law has become too deeply imbedded in our legal, political, and economic culture for the Court to repeal it wholesale under the Commerce Clause." *Id.*

GUVS therefore cannot persuasively argue that environmental law is a traditional area of state authority. In fact, GUVS might have more success arguing that CERCLA, as applied to this case, implicates educational law and therefore unconstitutionally treads into state authority, but this argument fails also. GUVS's educational orientation is irrelevant to the 123 Laurel Street cleanup. Although GUVS used the photographic chemicals as a teaching tool, its successor SUPS engaged in the same dumping practice for the same result. CERCLA applies because of the commercial implications of GUVS' dumping of photographic chemicals. Whereas the Gun-Free School Zones Act of 1990 clearly was enacted with education in mind, CERCLA has nothing to do with education. CERCLA is a pollution-control law, plain and simple.

(ii) The *Olin* court misread *Lopez* and misinterpreted the test set forth in that case.

With all due respect to the U.S. District Court for the Southern District of Alabama, Senior District Judge Hand misstepped when he explained what he viewed to be the test in *Lopez*: "*Lopez* requires 1) that the statute itself regulate economic activity, which activity 'substantially affects' interstate commerce . . . and 2) that the statute include a 'jurisdictional element' which would ensure, through a case-by-case inquiry, that the [statute] in question affects interstate com-

merce." *Olin*, 927 F. Supp. at 1532. With regard to the first element, Judge Hand hit the nail on the head. On the second element, however, the honorable judge misfired.

The Supreme Court in *Lopez* noted that "§ 922(q) has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce," but only after first concluding that the Gun-Free School Zones Act did not on its face implicate an economic activity that had a substantial effect on interstate commerce. *Lopez*, 115 S.Ct. at 1631. The gist was that a jurisdictional element would be required only if a general substantial effect on interstate commerce could not be found. *Id.*

"We agree with the government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce." *Id.*

Because a statute need not include a jurisdictional element if it clearly applies to an economic activity that substantially affects interstate commerce, *Olin* is a flimsy foundation on which to build a case. GUVS's reliance on *Olin* emphasizes the weakness of its assertion that application of CERCLA to the case at hand is unconstitutional.

Reliance on *Olin* is further devalued by the widespread criticism that the opinion has received. In addition to the courts that refuse to apply *Olin*'s CERCLA retroactivity holding, the U.S. District Court for the Southern District Illinois refused to apply *Olin*'s Commerce Clause jurisdiction reasoning. *United States v. NL Indus. Inc.*, No. 91-CV-578-JLF (S.D. Ill.1996). "*Lopez* does not require that a statute contain a 'jurisdictional element' which would ensure, through a case-by-case inquiry, that the statute affects interstate commerce," the court said. *Id.*

Democratic staff members of the House Commerce Committee have also criticized *Olin*, noting that Judge Hand's decision deeming CERCLA to be nonretroactive and in violation of the Commerce Clause is alone among federal court decisions. 9 No. 6 Mealey's Litig. Rep.: Superfund 4 (June 1996).

(iii) *Seminole* does not dispose of WUWPS's claim against GUVS because the material issue in *Seminole* differs from that in the case at hand.

GUVS's reliance on *Seminole* is a bit bewildering. In *Seminole*, the U.S. Supreme Court ruled that Congress does not have the authority to waive a state's right to be free from citizen suit under the 11th Amendment of the Constitution. *Seminole*, 116 S.Ct. 1114. Apparently, GUVS is trying to claim that it is a state agency, but its current administration does not qualify it to be a state agency.

Presumably, GUVS's argument goes something like this: The state legislature incorporated GUVS by a special act of legislation and allocated $1 million to start the school, which took the place of the traditional state college. Thus GUVS believes that it more or less amounts to a state agency, making a lawsuit against it equivalent to one against the state of New Union.

Nice try, but in a 1964 opinion, the New Union Attorney General said that "GUVS is not an instrumentality of the New Union state government." (R. at 4). In addition, not only has GUVS never received any additional funds from the state of New Union beyond the initial $1 million, but it received a bequest of $3 million from local rancher Mollie Peterson in 1972 and used the money to build state-of-the-art facilities at its current location without any guidance from the state. (R. at 5).

GUVS is not a state agency. It is not an instrumentality of the government. And as an independent institution, it has accepted a substantial amount of financial support from the private sector. It is difficult to fathom how suing GUVS could be equivalent to suing the state of New Union, but such a stretch would be necessary if any credence were to be given to GUVS's reliance on *Seminole*.

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT WUWPS HAS THE CHOICE OF SEEKING COST RECOVERY, INCLUDING EXPENSES FOR THE ORPHAN SHARE OF CLEANUP COSTS, FROM GUVS UNDER CERCLA 107, BUT DOING SO DOES NOT EXPOSE WUWPS TO LIABILITY FOR MEDICAL COSTS.

CERCLA's private liability provisions are facially so unclear that even when it is apparent that CERCLA is applicable to a hazardous waste release, the allocation of liability among parties is often disputed. GUVS appeals the district court's holding that WUWPS may elect to proceed against it under either of CERCLA's two private liability provisions. Careful analysis of the statute reveals that the district court correctly interpreted CERCLA in that holding. However, the court also held that CERCLA allows recovery for costs of medical monitoring programs amounting to personal injury treatment and prevention. On that issue, the district court incorrectly interpreted CERCLA's liability provisions.

A. The court below properly ruled that WUWPS could proceed under either CERCLA 107 for compensation of cleanup costs or CERCLA 113 for contribution to cleanup costs.

Congress added section 113 to CERCLA in 1986 without indicating whether the new legislation should supplement or preclude section 107 actions. A number of courts have held that private parties who are themselves PRPs may not recover under section 107, but are limited to section 113's contribution provision. *United States v. Colorado & Eastern R.R. Co.*, 50 F.3d 1530 (10th Cir. 1995); *United Technologies Corp. v. Browning Ferris Indus., Inc.*, 33 F.3d 96 (1st Cir. 1994), *cert. denied*,115 S. Ct. 1176 (1995); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994). Many of these opinions were result-oriented, however, and were crafted to protect settling parties or parties who would be harmed by the statute of limitations differences between the two provi-

sions. Neither of those concerns is present in the case at hand.

(i) CERCLA 113 merely provides an alternative cause of action for cost recovery.

Theoretically, whether an action is brought under 107 or 113 should make no substantive difference, merely a procedural one. Steven F. Baicker-McKee and James M. Singer, *Narrowing the Roads of Private Cost Recovery: Recent Developments Limiting the Recovery of Pirvate Response Costs Under CERCLA 107*, 25 Envtl. L. Rep. (Envtl. L. Inst.) 10593, 10595 (Nov. 1995). Realistically, however, courts have come to interpret the two sections to provide different scopes of liability. Section 113 allocates liability using "equitable factors," which, some courts maintain, leave plaintiffs responsible for "orphan shares," the costs attributable to judgment-proof parties. *See* 42 U.S.C. § 9613(f)(1). CERCLA 107 authorizes a cause of action to recover costs of removal, remediation, and other necessary costs consistent with the National Contingency Plan. 42 U.S.C. § 9607(a)(4)(A)-(D). GUVS asserts that WUWPS, as a PRP, is limited to contribution under section 113, and that GUVS therefore is not liable for the orphan share of costs allocable to the bankrupt SUPS.

Most courts do not share GUVS's construction of CERCLA. An extensive and growing body of case law confers section 107 standing on parties who incur response costs regardless of their own potential liability. *See Alcan Aluminum Corp.*, 964 F.2d at 261; *Adhesives Research, Inc. v. Am. Inks & Coatings Corp.*, 931 F. Supp. 1231, 1238 (M.D. Pa. 1996). Many courts allow PRPs to pursue claims under either section, viewing 113 as a clarification to 107, an interpretation of the CERCLA liability scheme strongly supported by the only Supreme Court opinion to address CERCLA liability allocation. *See Key Tronic Corp. v.U.S.*, 511 U.S. 809 (1994).

It is also important to note how section 113 complements section 107. "[S]ection 113(f) . . . expressly recognizes a right of contribution. [It] does not create the right of contribution — rather the source of a contribution claim is section 107(a).

Under CERCLA's scheme, section 107 governs liability, while section 113(f) creates a mechanism for apportioning that liability among responsible parties." *United States v. ASARCO, Inc.*, 814 F. Supp. 951, 956 (D. Colo. 1993) (citations omitted). As an addendum to 107, therefore, section 113 should not preclude actions taken under 107 by most PRPs, but rather should supplement 107 with an alternative cause of action.

(ii) Section 113 encourages early settlements and protects settling parties from future claims by holdout parties.

In addressing CERCLA liability allocation, courts should keep in mind Congress's intent that toxic waste sites be cleaned up expeditiously and fairly. *ASARCO*, 814 F. Supp. at 956. Section 113 serves this purpose by encouraging parties to settle quickly and avoid costly litigation expenses that eat up money that could otherwise be used for cleanup. In section 113(f)(2), CERCLA provides contribution protection to those who have already settled out of a dispute, forbidding remaining litigants from suing settling parties for contribution over and above the amounts already paid in settlement. 42 U.S.C. § 9613(f)(2).

As such, 113 does not really even apply to the circumstances of the case before this court. WUWPS undertook to clean up the contamination immediately upon notification of the threat it posed to the Marina family. Nobody had an opportunity to settle before or during the cleanup. Here there is no fear that litigation expenses will consume resources that could otherwise be used in CERCLA response activities because everything that needs to be cleaned up has been cleaned up.

It makes sense that WUWPS should have its choice of sections under which to seek recovery from other responsible parties. Forcing WUWPS to invoke section 113 as its authority for this claim penalizes WUWPS for providing prompt and responsible action.

Restricting PRPs to section 113 contribution claims actually hurts parties who have taken on the responsibility of re-

sponding to hazardous substance releases without a thought as to what their own ultimate liabilities are. Should such a PRP encounter a court that unfairly construes the equitable factors of liability allocation required by section 113, it could be saddled with shares of the response costs attributable to judgment-proof parties. 42 U.S.C. § 9613(f). Smart PRPs would refrain from taking action, then, to avoid being stuck with the bills.

(iii) Administrative reforms and recent case law support the choice-of-law theory.

The Environmental Protection Agency appears to have taken this and other issues into consideration, announcing several "common sense" administrative reforms in October of 1995. U.S. Environmental Protection Agency news release, Oct 2, 1995. Using these guidelines, orphan share issues may be resolved before ever even getting to the contribution phase. In looking to these guidelines, GUVS is liable for remediation costs due to SUPS's conduct as well as its own.

Recently, the Middle District of Pennsylvania allowed a PRP who had settled with the government to bring a section 107 action against nonsettling PRPs. *Adhesives Research, Inc.*, 931 F. Supp. 1231. The court asserted that only nonsettling parties should be limited to section 113 claims for contribution.

Using this analysis, WUWPS is entitled to seek recovery under section 107, and GUVS cannot escape liability for SUPS's share of the cleanup costs. Although the EPA and New Union did not become involved in the site remediation, WUWPS's position is analogous to that of a settling party who has performed cleanup in accordance with a consent decree or agreement with the government. WUWPS voluntarily cleaned up a waste hazard to which it in no way contributed. Like a settling party, WUWPS did not attempt to stall or avoid costs by litigating before cleanup and forcing a time-consuming and expensive court proceeding, but rather, addressed the problem in an efficient and responsible manner. To reward WUWPS for its prompt attention by restricting it

to a contribution claim would not only contradict the statutory scheme, it would be inequitable.

By the same token, GUVS takes a position comparable to that of the nonsettling party. In a situation where there is no settlement or consent decree with the government, the analysis should logically be that those PRPs who resist liability are the PRPs who are limited to section 113 actions, and are therefore the PRPs who will assume the orphan share costs.

(iv) In the alternative, even if WUWPS were to be limited to contribution under CERCLA 113, GUVS would still be liable for SUPS's "orphan share" of cleanup cost.

Even if section 113 were to preclude WUWPS from proceeding under section 107, GUVS still would not escape orphan share liability. According to the Fifth Circuit, a court has considerable latitude under section 113 to determine each party's equitable share of response costs. *Amoco Oil Co. v. Borden, Inc.*,889 F.2d 664, 672 (5th Cir. 1989).

The Fifth Circuit turned to a failed amendment for guidance in suggesting possible relevant factors. *Id.* The "Gore Factors,"as they are commonly known, would have provided courts with the discretion to apportion damages even in cases where a PRP is unable to demonstrate its contribution to the environmental damage. The factors would also have considered the different parties' degrees of participation in the hazardous waste releases and degrees of cooperation with government officials to prevent harm to the public health or environment. 126 Cong. Rec. 30,909 (1980). Under this analysis, a court could even apportion SUPS's orphan share entirely to GUVS in light of GUVS's responsibility for the chemical dumping at 123 Laurel Street.

Other courts have also held that their broad powers of equity allow them to allocate orphan shares among *any* viable parties even when restricting PRPs to section 113 actions. According to the District Court for the Southern District of New York, "Courts can use the powers provided by Sec. 113(f) to allocate any 'orphan shares' among viable PRPs, with the

result that each viable PRP's allocable share may include a portion of whatever 'orphan shares' there are." *Town of New Windsor v. Tesa Tuck, Inc.*, 919 F. Supp. 662, 681 (S.D.N.Y. 1996).

B. CERCLA does not provide a cause of action for the recovery of the costs of the Marinas' medical monitoring regime because it is a protocol for personal injury treatment or prevention.

The district court's award of medical monitoring costs to SNUHSA is erroneous because CERCLA does not provide a cause of action for personal injury or disease damages. The Marinas' medical monitoring program falls outside the scope of the health studies programs authorized by CERCLA.

(i) CERCLA only authorizes causes of action for the recovery of response costs, not for the recovery of personal injury or economic loss damages.

CERCLA section 107 establishes a cause of action for recovery of costs incurred in responding to a toxic release. The section does not specifically address the issue of medical monitoring, however, so the court must turn to statutory construction to determine whether or not CERCLA allows for recovery of medical monitoring costs.

Section 107 allows private recovery for four categories of damages: the costs of removal and remedial action incurred by government agencies; necessary costs of response incurred by private parties; damages to natural resources; and the costs of health assessments and health effects studies performed as authorized by CERCLA. 42 U.S.C. § 9607(a)(4)(A)-(D). Because SNUHSA is a government entity, the court need not consider the issue of costs necessarily incurred by private parties, and because SNUHSA's issue does not involve damage to natural resources, the court can automatically rule that category out of consideration. The other categories require further consideration.

(a) The Marina family's medical monitoring program is not a removal or remedial action.

SNUHSA is suing for recovery of medical monitoring costs. SNUHSA is the state of New Union's public health department, a state government entity that qualifies under CERCLA 107(a)(4)(A). (R. at 6). If SNUHSA can allege that the medical monitoring costs are "costs of removal or remedial action incurred [by it] not inconsistent with the national contingency plan," then the district court's ruling on the issue is correct. 42 U.S.C. § 9607(a)(4)(A).

SNUHSA cannot do so. The parties have stipulated that the Marina family's medical monitoring program is not inconsistent with the national contingency plan, but the costs of the program do not fall within the scope of "removal or remedial action," as required for recovery. "Removal" is "the cleanup or removal of released hazardous substances from the environment." 42 U.S.C. § 9601(23). "Remedial action[s]" are "those actions consistent with permanent remedy taken instead of or in addition to removal actions . . . to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment." 42 U.S.C. § 9601(24).

Both definitions focus on the hazardous substances that have been released. They do not consider the people who have already suffered exposure. This is because CERCLA is a response mechanism, geared toward containing and preventing further damage.

Both definitions list a series of authorized response activities. "Removal" includes installation of security fencing, limitation of access to the site, and temporary evacuation and housing for individuals at risk of exposure. 42 U.S.C. § 9601(23). For both removal and remedial action, all examples are containment procedures or methods of assessing the spread of the released substances.

Courts interpreting CERCLA should use these examples as guidelines to determine what Congress intended.

Although the code states that the removal and remedial actions are not limited to activities listed in the examples, the examples show what type of activities are authorized. *See Ambrogi v. Gould, Inc.*, 750 F. Supp. 1233, 1247 (M.D. Pa. 1990) (citing *Coburn v. Sun Chem. Corp.*, 28 Env't Rep. Cas. (BNA) 1590, 1988 WL 120739 (E.D. Pa. 1988) (discussing ejusdem generis analysis)). This method of analysis is known as ejusdem generis, meaning "of the same kind." Use of it allows a simple conclusion that Congress meant to focus on preventing the spread of the chemicals that have been released and not on the development of ailments in people who have already been exposed.

For medical monitoring costs to qualify under section 107, the monitoring must go toward the removal or remedial action undertaken to counteract the release of hazardous substances. *See Brewer v. Ravan*, 680 F. Supp. 1176 (M.D. Tenn. 1988). To so qualify, the purpose of the medical monitoring must be to assess the extent of the release or to gather epidemiological data about the characteristics of the hazardous substances.

The Marinas' medical monitoring does not fulfill such a purpose. The monitoring consists of examination of "each member of the family . . . for sign of adverse effects from having consumed the contaminated water." (R. at 7). The small scope of contamination and exposure precludes the possibility that this medical monitoring program is for the prevention of further exposure. The full extent of the contamination is known. The parties have stipulated that WUWPS has fully remediated the site, thereby negating the possibility of further contamination or exposure.

There remains the argument that the Marinas' medical monitoring program does prevent future danger to public health and welfare because the health of the Marinas qualifies as such. Most courts dismiss this argument as too far a stretch, however. In particular, the court in *Werlein v. U.S.*, 746 F. Supp. 887, 904 (D. Minn. 1990), disposed of that argument:

> It is true that medical monitoring could mitigate the adverse public health effects of the release. However, it is equally true that removing a cancerous tumor from a victim would also mitigate the adverse public health effects in the same manner. Examining the tumor prior to surgery would certainly be an "assessment" of the effect of [the toxin] on the victim. Yet it is clear that the mitigation and assessment described above are medical procedures for the treatment of injury, the costs of which are not recoverable as response costs.

The Marinas' medical monitoring program is such a procedure. SNUHSA cannot recover the costs for it under CERCLA 107.

(b) The Marinas' medical monitoring program is not a health assessment or health effects study.

CERCLA 107(a)(4)(D) provides for recovery of health assessment and health effects study expenses authorized by CERCLA 104(i). 42 U.S.C. § 9607(a)(4)(D). This would seem fertile ground for SNUHSA's claim, but the Marinas' program does not fall within its scope.

Section 104(i) sets up a three-tiered system of health studies for toxic releases. 42 U.S.C. § 9604(i). Progression through the three stages is supervised by the local administrator of the Agency for Toxic Substances and Disease Registry (ATSDR), an agency within the Public Health Service. Because the ATSDR administrator must order or approve each progression through 104(i)'s layers of health studies, courts have concluded that "[o]nly governmental entities may recover the cost of medical monitoring, as performed" by the ATSDR. *Murray v. Bath Iron Works Corp.*, 867 F. Supp. 33, 47 (D. Maine 1994)(citing *Daigle v. ShellOil Co.*, 972 F.2d 1527 (10th Cir. 1992)). SNUHSA could sue for cost recovery under this section if it can allege that the medical monitoring costs are proper under section 107, but it cannot do so.

The three levels of health studies called for by CERCLA 104(i) are health assessment, health effects studies, and health surveillance programs. 42 U.S.C. § 9604(i)(6),(7),(9).

Note that section 107(a)(4)(D) only authorizes the recovery of the costs for health assessments and health effects studies. 42 U.S.C. § 9607(a)(4)(D).

Health assessments are "preliminary assessments of the potential risk to human health posed by individual sites and facilities" and consist of toxicology reviews and evaluation of emissions pathways. 42 U.S.C. § 9604(i)(6)(F). Local ATSDR administrators must perform these assessments at sites listed on the national priorities list and upon the request of individuals or physicians. 42 U.S.C. § 9604(i)(6)(A),(B). If the ATSDR administrator determines that there has been an appreciable release, he may authorize a health effects study, which includes epidemiological testing and other studies of the dangers posed to exposed human populations. 42 U.S.C. § 9604(i)(7)(B). If those studies show a significant risk of adverse health effects in humans, then the administrator finally may call for a health surveillance program, including medical monitoring of the type ordered for the Marinas: periodic medical testing, screening for disease, and treatment referral. 42 U.S.C. § 9604(i)(9).

This system uses medical assessment and surveillance to determine the extent of release and to formulate response actions to prevent future release and exposure from the same site. Only in emergencies may the ATSDR administrator authorize continued medical monitoring for victims of exposure, since doing so is considered treatment for injury. "[I]n cases of public health emergencies caused . . . by exposure to toxic substances, [the administrator shall] provide medical care and testing to exposed individuals, including but not limited to tissue sampling, chromosomal testing where appropriate, epidemiological studies, or any other assistance appropriate under the circumstances." 42 U.S.C. § 9604(i)(1)(D).

The Marinas' exposure to the photographic chemicals is hardly a continuing public health emergency. The contamination was limited to the seven family members, and the source of the exposure has been removed. Furthermore, there is no evidence that SNUHSA's examination of the situation progressed in the fashion outlined in CERCLA. (R. at 6-7). SNUHSA skipped CERCLA 104(i)'s first two steps and

automatically ordered the medical monitoring program. Besides, medical monitoring fall under the category of health surveillance programs, the costs of which are not recoverable under CERCLA 107. 42 U.S.C. § 9607(a)(4)(D).

(ii) Courts distinguish between CERCLA-authorized medical monitoring and medical monitoring for personal health, denying recovery for the latter under CERCLA.

Sometimes it is necessary to monitor local populations for exposure effects to determine the extent and severity of a release. Such medical monitoring costs are necessary response costs under CERCLA and consistent with the National Contingency Plan. *See* 40 C.F.R. § 300 (1995). They are recoverable under CERCLA 107(a). Other medical monitoring programs do not qualify.

There are two lines of cases that address medical monitoring costs under CERCLA: those following *Brewer v. Ravan*, 680 F. Supp.1176, holding that medical monitoring costs are recoverable under CERCLA because they address a necessary response to hazardous substance releases; and those following *Coburn*, 28Env'tRep. Cas. (BNA) 1668, rejecting any contention that medical testing and monitoring can serve as a remedial measure and thus be "necessary costs of response" under section 107.

The *Brewer* cases evolve by noting that not all medical monitoring costs address CERCLA-authorized response to the same degree. *Lykins v. Westinghouse Elec.*, 27 Env't Rep. Cas. (BNA) 1590, 1988 WL 114522 (E.D. Ky. 1988), pointed out that medical monitoring costs are recoverable if they are part of a cleanup. Meanwhile, the *Coburn* cases in the soften away from *Coburn*'sharsh rule: the court in *Williams v. Allied Automotive, Autolite Division*, 704 F. Supp. 782 (N.D. Ohio 1988), held that medical monitoring costs are not categorically unrecoverable under CERCLA. *Williams* stated that if costs are necessary under and consistent with the National Contingency Plan, they may be recoverable. *Id.* at 784.

The two lines of cases merged in *Cook v. Rockwell Int'l Corp.*, 755 F. Supp. 1468 (D. Colo. 1991), in which the Colorado court decided that medical monitoring may be bifurcated into monitoring for personal health and monitoring for determination of the status and extent of toxic release and contamination. Expenses for the former are not recoverable under CERCLA, but the latter are. *Id.* at 1474. This merger was cemented by the Tenth Circuit's decision in *Daigle v. Shell Oil Co.*, 972 F.2d 1527, in which the circuit court reviewed CERCLA recommendations for monitoring programs and found that the authorized programs relate "only to an evaluation of the extent of a 'release or threat of release of hazardous substances'" and consist of actions necessary to "prevent or mitigate damage to public health by preventing contact between the spreading contaminants and the public."

The *Daigle* court denied the plaintiffs' request for long-term health monitoring costs "to assist plaintiffs and class members in the prevention or early detection and treatment of chronic disease" because such monitoring "clearly has nothing to do with preventing contact between a 'release or threatened release' and the public. The release has already occurred." *Id.* The Marinas' medical monitoring program likewise has nothing to do with preventing contact between a release and the public. The release has already been cleaned up, the extent of the exposure already determined, the future threat from GUVS's and SUPS's drainage of photographic chemicals into the backyard ditch at 123 Laurel Street dispelled. The Marinas' monitoring may not therefore spawn a claim for recovery under CERCLA. *See Werlein*, 746 F. Supp. at 904.

(iii) Congress did not intend to create a cause of action for personal injury under CERCLA.

A look at the evolution of CERCLA in both Congressional houses easily reveals what Congress intended to do with CERCLA.

The House bill originally authorized a cause of action for the recovery of "all damages for personal injury, injury to real or personal property, and economic loss, resulting from re-

lease." H.R. 7020, 96th Cong., 2d Sess. (1980), *reprinted in Superfund: A Legislative History*, (Envt'l L. Inst.) (1982), at Vol. III, 183. The bill that the House enacted six months later did not contain this provision. *Id.* Its deletion did not go unnoticed: several members of the House remarked on its absence, including Representative Gore, who bemoaned the "drastic whittling down of the original liability provisions." H.R. Rep. No. 016, 96th Cong., 2d Sess., pt. 1, at 62-65 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6139-41. Such remarks show that Congress engaged in a complete discussion about the deletion and purposefully intended for personal injury and economic loss provisions to be excised from the bill.

The original Senate bill likewise authorized a private cause of action for the recovery of "out-of-pocket medical expenses, including rehabilitation costs or burial expenses, due to personal injury." S. 1480, 96th Cong., 2d Sess. (1980), *reprinted in Superfund: A Legislative History* at Vol. I, 289. This provision was also rejected, and the House's edited version was adopted by the Senate as a compromise bill. The compromise bill's cosponsor, Senator Randolph, specifically pointed out that "we have deleted the Federal cause of action for medical expenses or income loss." 126 Cong. Rec. 14,964 (1980), *reprinted in Superfund: A Legislative History* at Vol. II, 260. Senators Mitchell and Williams, among others, criticized the loss of compensation for personal injury. 126 Cong. Rec. 30,941, 30,970 (1980).

However, "Congress did not intend to make injured parties whole or to create a general vehicle for toxic tort actions." *Ambrogi*, 750 F. Supp. at 1238. "[A] statute should be construed in harmony with the sphere of legal remedies available[.] Congress surely did not intend to create an overlap between traditional state tort claims and a 'new' CERCLA federal toxic tort action." *Id.* at 1250. Doing so would have further confused the already chaotic world of toxic tort litigation. *See In re Telectronics Pacing Systems, Inc.*, 168 F.R.D. 203 (S.D. Ohio 1996)(listing traditional tort requirements for medical monitoring damages in each of the fifty states).

Since a "request for medical monitoring to allow 'prevention or early detection and treatment of chronic disease'

smacks of a cause of action for damages resulting from personal injury," the *Daigle* court denied medical monitoring costs to the plaintiffs. 972 F.2d at 1535. SNUHSA's claim for the costs of the Marinas' quarterly medical monitoring "for sign of adverse effects from having consumed the contaminated water" also smacks of a cause of action for damages resulting from personal injury. Considering Congress's intentional omission of medical expenses from CERCLA's recovery provisions and considering the potentially confusing overlap with state toxic tort law, SNUHSA cannot invoke CERCLA to recover the costs of the medical monitoring program from WUWPS. The district court erred in allowing SNUHSA to do so.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court uphold the United States District Court for the District of New Union's ruling on applicability of CERCLA, uphold the ruling on choice of law between CERCLA 107 and CERCLA 113, and overrule the decision to allow recovery for medical monitoring costs under CERCLA. Neither GUVS nor SNUHSA has asserted a genuine issue for trial. WUWPS is therefore entitled to summary judgment on all issues.

APPENDIX

Statutory Provisions

Section 101(23) of CERCLA, 42 U.S.C. § 9601 *et seq.* provides in pertinent part:

> The terms "remove" and "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare of to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for . . .

42 U.S.C. § 9601(23).

* * * *

Section 101(24) of CERCLA provides in pertinent part:

> The terms "remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alter-

native water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment."

42 U.S.C. § 101(24).

* * * *

Section 104(i) of CERCLA provides in pertinent part the following:

(1) There is hereby established within the Public Health Service an agency, to be known as the Agency for Toxic Substances and Disease Registry, which shall . . . effectuate and implement the health related authorities of this chapter.

* * *

In addition, said Administrator shall —
(D) in cases of public health emergencies caused or believed to be caused by exposure to toxic substances, provide medical care and testing to exposed individuals, including but not limited to tissue sampling, chromosomal testing where appropriate, epidemiological studies, or any other assistance appropriate under the circumstances. . .

* * *

(6)(B) The Administrator of ATSDR may perform health assessments for releases or facilities where individual persons or licensed physicians provide information that individuals have been exposed to a hazardous substance, for which the probable source of such exposure is a release.

* * *

(F) For the purposes of this subsection . . . the term "health assessments" shall include preliminary assessments of the potential risk to human health posed by individual sites and facilities, based on such factors as the nature and extent of contamination, the existence of potential pathways of human exposure (including ground or surface water contamination, air emissions, and food chain contamination), the size and potential susceptibility of the community within the likely pathways of exposure, the comparison of expected human exposure levels to the short-term and

long-term health effects associated with identified hazardous substances and any available recommended exposure or tolerance limits for such hazardous substances, and the comparison of existing morbidity and mortality data on diseases that may be associated with the observed levels of exposure.

* * *

(7)(A) Whenever in the judgment of the Administrator of ATSDR it is appropriate on the basis of the results of a health assessment, the Administrator of ATSDR shall conduct a pilot study of health effects for selected groups of exposed individuals in order to determine the desirability of conducting full scale epidemiological or other health studies of the entire exposed population.

(B) Whenever in the judgment of the Administrator of ATSDR it is appropriate on the basis of the results of such pilot study . . . the Administrator of ATSDR shall conduct such full scale epidemiological or other health studies as may be necessary to determine the health effects on the population exposed to hazardous substances from a release or threatened release.

* * *

(9) Where the Administrator of ATSDR has determined that there is a significant increased risk of adverse health effects in humans from exposure to hazardous substances based on the results of a health assessment. . .[or] an epidemiological study. . . the Administrator of ATSDR shall initiate a health surveillance program for such population. This program shall include but not be limited to —

(A) periodic medical testing where appropriate of populations subgroups to screen for diseases for which the population or subgroup is at significant increased risk; and

(B) a mechanism to refer for treatment those individuals within such population who are screened positive for such diseases.

42 U.S.C. § 104(i).

* * * *

In pertinent part, section 107 of CERCLA provides that

> "(1) the owner and operator of a vessel or a facility [or] (2)any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . . shall be liable for — (A) all costs of removal or remedial action incurred by the . . . [g]overnment . . . not inconsistent with the national contingency plan; (B) any other necessary costs or response incurred by any other person consistent with the national contingency plan; (C) damages for injury to . . . natural resources . . .; and (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title."

42 U.S.C. § 9607(a).

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In pertinent part, section 113(f) of CERCLA provides that "Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title. . ." 42 U.S.C. § 9613(f).